HIGH COURT OF HIMACHAL PRADESH AT SHIMLA

RSA No.: 94 of 1995
Reserved on: 20.8.2007
Decided on: 24.8.2007

Suresh Kumar Chandan and another .....Appellants.

Versus

Sher Singh .....Respondent.

Coram:

The Hon'ble Mr.Justice V.K. Ahuja, Judge.

Whether approved for reporting? Yes.

For the appellants: Mr.Bhupender Gupta, Senior Advocate, with Mr.Janesh Gupta, Advocate.

For the respondent: Mr.Romesh Verma, Advocate.

V.K. Ahuja, J:

This is a regular second appeal filed by the appellants against the judgment and decree of the court of learned District Judge, Shimla, dated 23.2.1995, vide which he set aside the judgment and decree of the court of learned Sub Judge, Court No.II, Shimla, decreeing the suit of the appellants for permanent injunction as well as for mandatory injunction.

Briefly stated the facts of the case are that the appellants as plaintiffs filed a suit for permanent prohibitory injunction as well as for mandatory

---

[1]. Whether reporters of Local papers may be allowed to see the judgment? Yes.

injunction alleging that the defendant had encroached upon the suit land by raising three pillars over part of the land. The plaintiffs alleged that on 21st June, 1984, when they visited their plot, they found that the defendant had excavated a portion of the land with a view to raise the pillars which were raised thereafter. Hence suit for permanent injunction as well as for mandatory injunction for demolition of the pillars filed by the plaintiffs.

Defendant alleged that he was the owner of the adjoining land and that he had raised pillars in the year 1980 over his own land and at that time no objection was raised by the plaintiffs. The suit was tried by the learned Trial Court, who found that the defendant had encroached over the suit land to the extent of 31 sq.yards 6 sq.ft. and accordingly the suit was decreed for permanent injunction as well as for mandatory injunction. An appeal was preferred by the defendant/respondent and during the pendency of the appeal, the parties agreed to the appointment of a Local Commissioner, who was appointed by the Court, who submitted his report and after taking into consideration the report of the Local Commissioner that no encroachment was found on the suit land, the appeal was accepted and the suit was dismissed.

On an appeal preferred before this Court, a plea was raised by the learned counsel for the appellants/plaintiffs that the learned First Appellate Court had decided the appeal on the basis of the report of the Local Commissioner appointed by the Court only and had not considered the other evidence on record and on the presumption that since both the parties had agreed to abide by the report of the Local Commissioner appointed by the Court, the other evidence was not considered which should have been considered by the Court.

The said appeal was decided by a learned Single Judge of this Court vide its judgment dated 23rd December, 1994 and the case was remanded back to the learned District Judge for taking into consideration not only the report of the Local Commissioner appointed by the Court but other oral as well as documentary evidence placed on the record by both the parties. The learned District Judge, vide its impugned judgment, set aside the judgment and decree passed by the learned Sub Judge, Court No.II, Shimla and dismissed the suit of the plaintiffs.

I have heard the learned counsel for the parties and have gone through the record of the case.

The submissions made by the learned counsel for the appellants were that the learned District Judge had wrongly relied upon the report of the Local Commissioner appointed by the Court, which findings are not based upon correct appreciation of evidence and law since no objections were invited to the said report and the report was not in conformity with the directions issued by the Financial Commissioner and as such the appeal is liable to be accepted.

On the other hand, the learned counsel for the respondent had supported the impugned judgment for the reasons given therein.

A perusal of the record of the case shows that while filing the appeal, the appellants had also raised three substantial questions of law including the question that the report of the Local Commissioner was accepted without offering an opportunity to the parties to cross examine the Local Commissioner on material points and that there was misreading of the evidence by the learned

Appellate Court. However, the appeal was not admitted on these points but it was admitted only on first substantial question, which reads as under:

> *"Whether merely relying upon the report of the Local Commissioner that there is no encroachment on the land of the plaintiff made by the defendant-respondent, can the decree for permanent perpetual injunction be set aside with respect to the land undisputedly owned and possessed by the plaintiffs."*

On a perusal of the record of the case, it is clear that before the learned Trial Court, a Kanungo was appointed as Local Commissioner, who had submitted his report and had found that encroachment had been made by the defendant over part of the suit land. It appears that subsequently, the defendant had also procured a report of the Kanungo who was examined as DW-2, who had not given his report but only verified the papers submitted by the defendant and had found that the report filed by the earlier Kanungo in favour of the plaintiffs was not correct. Being dissatisfied with these reports, the learned District Judge, during the hearing of the appeal, had appointed Tehsildar as Local Commissioner on the statements of the parties who had agreed to abide by the report of the Local Commissioner. The said Local Commissioner submitted his report and as the record suggests, objections were not filed by the plaintiffs/appellants who alleged that they were ready with the objections but since the case was not fixed for filing of the objections and the learned First Appellate Court decided the appeal, they could not file objections or examine the Local Commissioner. This plea was raised as a substantial question of law but the appeal was not admitted on this point and it was for the plaintiffs to have filed the objections well in time and there was no inherent right of the plaintiffs

to cross examine the Local Commissioner once no objections had been filed to his report and, therefore, this plea is not open to be agitated before this Court.

Coming to the main question on which the appeal was admitted that whether the decree for permanent injunction could be set aside relying upon the report of the Local Commissioner that there was no encroachment when the suit land was owned and possessed by the plaintiffs. There are findings of the learned First Appellate Court who had relied upon the report of the Local Commissioner and had also referred to other oral as well as documentary evidence and concluded that no encroachment of the land was proved to have been made by the defendant over part of the suit land. Once it was proved that there was no encroachment on the suit land leading to the inference that no cause of action had arisen to the plaintiffs to file the suit, therefore, the learned First Appellate Court was right in dismissing the suit of the plaintiffs even for permanent injunction when it was not proved that the encroachment had been made over the suit land. Therefore, findings of the learned First Appellate Court dismissing the suit for mandatory injunction as well as for permanent injunction do not suffer from any illegality and cannot be termed as perverse keeping in view the report of the Local Commissioner appointed with the consent of the parties, who had clearly found that no encroachment was proved to have been made by the defendant over the suit land. There is no merit in the appeal filed by the appellants which deserves to be dismissed and the same is dismissed accordingly. Parties are left to bear their own costs.

August 24, 2007. **(V.K. Ahuja), J.**
(trs)